HO KOK SENG

v.

BOH HING SDN BHD

HIGH COURT SABAH & SARAWAK, BINTULU
ZULKIFLI BAKAR JC
[CIVIL APPEAL NO: 12-03-2004 (BTU)]
30 NOVEMBER 2005

CIVIL PROCEDURE: *Appeal - Appeal to High Court - Record of Appeal - Non-inclusion of documentary exhibits - Whether in contravention of O. 49 r. 3A of the Subordinate Courts Rules 1980 - Whether fatal - Whether compliance mandatory - Whether exclusion of documentary exhibits caused miscarriage of justice*

The appellant was the owner of the vessel ML Sri Anap which was destroyed in an explosion which occurred while filling petrol at the respondent's petrol station at Pasar Baru Wharf. The appellant sustained injuries. The appellant's claim against the respondent was for special and general damages for breach of contract of sale or for defective performance of delivery and alternatively for breach of statutory and/or common law duty of care. The respondent, on the other hand, counterclaimed against the appellant for loss of profit and loss of the petrol. The learned Sessions Court Judge dismissed both the claim and counterclaim and hence this appeal by the appellant. When the appeal came up for hearing, the respondent raised a preliminary objection for non-compliance of O. 49 r. 3A(1)(f) of the Subordinate Courts Rules 1980 ('the SCR') as the documentary exhibits were not included in the record and supplementary record of appeal. However, the appellant objected to the preliminary objection citing failure to give prior notice. The respondent also contended further that the documentary exhibits were not included in the record and supplementary record of appeal and no consent was requested from the respondent to exclude any of the documentary exhibits. Hence, the respondent submitted that the omission had caused substantial miscarriage of justice.

Held (dismissing the appeal with costs):

(1) Order 49 r. 3A(1) is mandatory in its term by the word 'shall' in the rule. The mandatoriness of O. 49 r. 3A(1)(f) of the SCR has been reinforced by r. 3A(2) of the said Order when the legislator had chosen the word 'shall' three times therein. In the circumstances, the preliminary objection was dismissed for non-compliance of O. 49 r. 3A of the SCR (*Datuk Bandar Kuala Lumpur v. Seman Amat & Other Cases*; *Sii Toh Siong v. Hong Ming Chung* (foll)). (para 9)

(2) The grounds of appeal in the present case were closely related to the finding of facts which required reference to the relevant documentary exhibits that had been excluded in the memorandum of appeal. It was for the court to decide which documents are relevant and which are not and further, the respondent need to refer to the documentary exhibits to establish their case in the appeal. Hence, the exclusion of the documentary exhibits had caused substantial miscarriage of justice to the respondent. (paras 16-17)

(3) Based on the record and supplementary record of appeal, the appellant and the respondent had not discharged their burden of proof required by the law. The learned Sessions Judge has meticulously scrutinised the evidence during the trial and applied the relevant laws therein. The findings of facts and law should not be disturbed as they were not manifestly wrong in any way. (para 18)

Case(s) referred to:

Datuk Bandar Kuala Lumpur v. Seman Amat & Other Cases [1996] 3 CLJ 263 HC ***(refd)***

Mat Yassin Dollah v. Ibrahim Hussin & Anor [1996] 4 CLJ 395 HC ***(refd)***

Sii Toh Siong v. Hong Ming Chung [2000] 2 CLJ 48 HC ***(refd)***

United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA ***(refd)***

Legislation referred to:

Subordinate Courts Rules 1980, O. 49 r. 3A(1)(f), (2)

For the defendant - Stephanie Chin; M/s Alvin Chong & Co Advocates
For the respondent - Henry Ling; M/s Ling & Wong Advocates

Reported by S Barathi

JUDGMENT

Zulkifli Bakar JC:

[1] The appellant (plaintiff) took out a summons against the respondent (defendant) on 27 June 1995 in the Sessions Court at Bintulu claiming special damages amounting to RM56,311.76 and general damages for breach of contract of sale or for defective performance of delivery and alternatively, for breach of statutory and/or common law duty of care to the appellant (plaintiff). The respondent (defendant) has counterclaimed against the appellant (plaintiff) for the sum of RM5,000 for loss of profit and a further sum of RM1,200 for loss of petrol. The learned Sessions Court judge on 19 February 2004 dismissed both the appellant's (plaintiff) claim and the respondent's (defendant) counterclaim and each party to pay their own costs.

[2] The appellant (plaintiff) being dissatisfied with the decision of the Sessions Court appealed to the High Court. The Notice of Appeal was filed on 3 March 2004 and Memorandum of Appeal was filed on 26 July 2004. The Record and Supplementary Record of Appeal was filed on 27 July 2004.

[3] Perusing the Record of Appeal, the brief facts of the case are that the appellant (plaintiff) was the owner of vessel ML Sri Anap and the respondent (defendant) was the owner and operator of the filling petrol station at Pasar Baru Wharf in Tatau, Bintulu. On 17 June 1993 at about 12.50pm while the vessel was filling petrol at the filling station an explosion occurred. The vessel was destroyed and the appellant (plaintiff) sustained injuries.

[4] The learned Sessions Court judge made a finding of facts on the issue of liability that the appellant (plaintiff) has failed to prove on balance that there was a breach of duty of care on the part of the respondent (defendant) both under contract and in negligence, but found that the said breach of duty of care was the cause of the accident or explosion. As for the counterclaim that there was contributory negligence, the respondent (defendant) has not proved on balance that the appellant's (plaintiff) negligence has contributed to the cause of the explosion.

[5] On perusing the Record and Supplementary Record of Appeal for the purpose of hearing of this appeal which came up before me on 19 October 2005 and for the purpose of weighing the merits of the matter. I found great difficulties since important and relevant evidence were not available from the Records. This is so because the Memorandum of Appeal refers to the findings of facts of the court below namely the evidence adduced and the documentary exhibits tendered in court.

[6] When this appeal came up for hearing before me on 19 October 2005, the learned counsel for the respondent raised a preliminary objection on the ground that O. 49 r. 3A(1)(f) of Subordinate Courts Rules 1980 has not been complied with as the documentary exhibits were not included in the Record and Supplementary Record of Appeal. The learned counsel for the appellant objected against the raising of the preliminary objection without giving prior notice.

[7] Order 49 r. 3A, Subordinate Courts Rules 1980 reads as follows:

> (1) When the appellant who is represented by a solicitor has complied with the requirements of rule 2 of this Order, the appellant shall prepare the requisite number of copies of the appeal record and the record shall contain copies of:

A (f) all such documentary exhibits and other documents the parties shall consider relevant for the purposes of appeal.

(2) If the appellant shall consider that any documentary exhibit used need not be included in the record he shall obtain the consent in writing of all parties to the appeal to the omission of the B documents from the record. Such written consent shall be included in the appeal record.

[8] Firstly, I propose to deal with the preliminary objections without prior notice as the learned counsel for the appellant put it, "I am totally caught by surprise. There was no notice whatsoever. I need time to C reply." Since he asked for time I allowed one hour time for counsel for the appellant to prepare his reply after hearing the preliminary objections by learned counsel for the respondent. When the court resumed after an hour's adjournment, the learned counsel for the appellant replied accordingly, and on the issue of not giving prior notice, the learned D counsel for the appellant submitted that it is against advocacy practice. He cited the case of *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31 CA in support of his contention. Unfortunately I did not find anywhere in the judgment of this case supporting his contentions. Perhaps the learned counsel for the appellant E was using this authority in support of his contentions on the exclusion of the documentary exhibits in the appeal records as mere technicality.

[9] Be that as it may, His Lordship Abdul Kadir Sulaiman J (as he then was) in *Datuk Bandar Kuala Lumpur v. Seman Amat & Other Cases* [1996] 3 CLJ 263 said:

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> Before the formal hearing of the three appeals, the learned counsel for the respondents, En Karpal Singh raised preliminary objection on a point of law in that as the various appeals of the appellants who filed in the registry of the Subordinate Court the appeals are not properly brought before the High Court being in contravention of Order 49, G rule 6 of the Subordinate Courts Rules. It is contended that the notices of appeal were not filed in the proper registry as required by the said rule 6. Rather unfortunate, however, no prior notice of the intention to raise the preliminary objection was given by the respondents to the appellants except for the indication given to their learned counsel orally just before the commencement of the hearing of the appeals. H

And at p. 267 he said:

> In opposition, the learned counsel for the appellants cited *Jasabena Sdn Bhd v. Beh Heng Poo & Anor* [1985] 1 MLJ 394. In that case, the sole question for the decision of the court I concerned the meaning and ambit of the phrases 'entering for hearing' in Order 53, rule 2 of the Rules of the High Court

> 1980 ('the RHC'). It arose on a preliminary objection taken by the respondent without any prior notice given to an application by the applicant for an order of *certiorari*. A

And at p. 268 he said:

> It is also my view that it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. The principle behind the need for the prior notice is merely to avoid surprise. But if by the conduct of the opponent it can be informed that no surprise to him has been caused as in this present case, the objector should be allowed to raise the intended preliminary objection even without any notice as was done in *Jasabena*'s case itself. Any preliminary objection raised may go to the root of the matter such as illegality in the proceedings taken. If it is so, the court has to accept the fact and cannot ignore the illegality as it goes to the very jurisdiction of the court in the proceedings. The court cannot condoned the illegality simply because no prior notice is given to raise the preliminary objection. Having heard the arguments by the two parties, I allowed the learned counsel for the respondent to raise the preliminary objection albeit only a short and oral notice was given to the appellants. B C D

[10] This view has been adopted with agreement by His Lordship Tee Ah Sing, J in the case of *Sii Toh Siong v. Hong Ming Chung* [2000] 2 CLJ 48 when he expressed the same view. I am in total agreement with the abovestated judgment and I am of the view further that even without preliminary objection, I would have considered dismissing this appeal on a the more important ground ie, the non-compliance of O. 49 r. 3A, Subordinate Courts Rules 1980. E F

[11] His Lordship Nik Hashim JC (as he then was) in *Mat Yassin Dollah v. Ibrahim Hussin & Anor* [1996] 4 CLJ 395 said:

> Order 49 r. 3A(1) is mandatory in its terms by reason of the word 'shall' in the rule (see *Datuk Bandar Kuala Lumpur v. Seman bin Amat And Other Cases* [1996] 3 CLJ 263). Accordingly, strict compliance with its provision is called for and failure to enclose anyone of the items in the record as required by the rule, in my view will then render the appeal record defective. It has been said time and again that rules of court must be obeyed (*Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 1 MLJ 228) and must be meticulously and faithfully complied with (per Low Hop Bing JC (as he then was) in *S Ravi a/l G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 2 CLJ 152 at p. 154). Failure to comply with them will lead to chaos in the conduct of litigation (*Sykt Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd* [1984] 2 MLJ 420 at p. 423, per Eusoff Chin SCJ (as he then was). G H I

A Thus, without the decision and following *Teoh Soon Koh*'s case, 1 hold that the appeal record in the present case was not properly before the court. The record suffered from a serious defect for not being in compliance with strict rules of Order 49 r. 3A(1)(d) of the SCR.

[12] I fully agree with His Lordship that O. 49 r. 3A(1) Subordinate B Courts Rules 1980 is mandatory in its term by the word "shall" in the Rule. I am also of the view that, as far as O. 49 r. 3A(1)(f) Rules of High Court is concerned, its mandatoriness has been re-enforced by r. 3A(2) of the said Order when the legislator has chosen the word 'shall' three times therein.

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[13] Learned counsel for the respondent complained that none of the documentary exhibits were included in the Record and Supplementary Record of Appeal and no consent was ever requested from the respondent to exclude any of the documentary exhibits. He contended further that the High Court in order to exercise its appellate jurisdiction D could not decide over the appeal, especially since this case being a full trial by the Sessions Court, when the appellate court have had no benefit of hearing witnesses and now without benefit of perusing the documentary exhibits. He submitted that the omission has caused substantial miscarriage of justice because:

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(a) This appeal is related to an appeal after a full trial whereby the witnesses were shown with the documentary exhibits. The learned Sessions Judge referred heavily on the said documents. Therefore the appellate court will not be able to decide accurately especially on facts without referring to the documentary exhibits and compare F them with the witnesses' testimony.

(b) The respondent is highly prejudiced as the respondent could not refer to the documentary exhibits in the appeal as the respondent is bound strictly to refer to the Record of Appeal.

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(c) The Record of Appeal is defective and therefore deemed to be incomplete appeal. If appeal is incomplete it is as good as no appeal. Therefore this court have no jurisdiction to hear the appeal.

[14] Learned counsel for the appellant on the other hand replied that H the appeal is complete except that the appellant did not obtain consent of the respondent to exclude the documentary exhibits (O. 49 r. 3A(2) Subordinate Courts Rules). He said that he is going to argue this appeal on points of law and not touching on finding of facts and will not refer to any of the documentary exhibits.

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[15] When I confronted him with his Memorandum of Appeal that all the grounds are related to finding of facts before any finding of law could be applied, he replied that he will abandon grounds 3, 7 and 8 of his Memorandum of Appeal and the appeal is to claim on liability for general damages. He will not refer to any of the documentary exhibits.

[16] Upon perusing the Memorandum of Appeal, I found the remaining grounds 1, 2, 4, 5 and 6 are very closely related to findings of facts and for the purpose of this appeal I need to refer to the relevant documentary exhibits in order to assess whether the findings of the learned Sessions Judge was supported by evidence or otherwise. By evidence I mean all the evidence adduced in the trial court whether oral or documentary by virtue of the Evidence Act.

[17] I am not inclined to agree with the contention of the learned counsel for appellant. I wish to reiterate further that it is not the choice or at the whims and fancy of the counsel for the appellant to exclude any documentary evidence and deprive this court to discharge its function. It is for the court to decide which documents are relevant and which are not and further the learned counsel for the respondent needs to refer to the documentary exhibits to establish their case in the appeal. I agree with the learned counsel for respondent that the exclusion of the documentary exhibits has caused substantial miscarriage of justice to the respondent in the circumstances of this case.

[18] As to the merits of the case I have read the Record and Supplementary Record of Appeal consisting of the notes of evidence and grounds of judgment of the learned Sessions Judge (without the benefit of referring to any documentary exhibits such as photographs etc.) and I am inclined to agree with the findings of facts therein. Both the appellant (plaintiff) and the respondent (defendant) have not discharged their burden of proof required by the law. The learned Sessions Judge have meticulously scrutinized evidence, oral and documentary, during the trial and applied the relevant laws therein. Those finding of facts and law should not be disturbed as I did not find that they were manifestly wrong in any way.

[19] As there was no cross-appeal by the respondent and for the foregoing reasons, I dismissed the appellant's appeal with costs.